IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1211

DR. LANDRUM TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY OF PETITIONER

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I. INTRODUCTION

The Government has chosen to submit a brief on the merits of the legal issues raised by the Petitioner. In so doing in this certiorari proceeding the Government has presented a cut-down, capsule version of the arguments on the merits. And in so doing, the Government has left unanswered the pressing reasons, set forth in the Petition, why this Court should consider the merits of the issues in this case in their entirety, with full briefing and argument. Those unanswered reasons demonstrate the severe difficulties encountered in administration of the two federal perjury statutes now in effect, if the decision below is permitted to stand.

II.

(a) Petitioner has argued that the Omnibus Crime Act of 1970 put into law major modifications of the federal perjury statute: *First*, it eliminated the two-witness rule, and *Second*, it created a statutory defense for timely recantation. Such modification dealt solely with perjury before federal courts and grand forces.

Now the Government concedes that the decision below nullifies these Congressional policies. It concludes summarily that this nullification – by whim of any prosecutor – is what Congress intended. But in so doing, the Government provides the Court with the most cursory of glances at the statutory scheme and history of Title IV, of the Omnibus Act[1] which it sets forth in two short paragraphs. Then, following, this brief glimpse into the history of an enactment that grew out of an extensive study by a Presidential Crime Commission, and was passed after more than three years of careful gestation by scholars and legislators, the Government concludes:

> "The statutory scheme thus indicates that Section 1623 was designed as an alternative means of prosecuting certain kinds of perjury." (Gov. Opp. p. 7)

Nowhere in the extensive legislative history of Title IV does that statement – or any statement remotely like it – appear. In sum, the history and statutory scheme of Title IV deserves more careful consideration than the Government has given it.

Properly, fully spread before this Court, the legislative history of Title IV will reflect a desire by Congress for a tough new perjury law with a wholly new recantation provision designed to induce voluntary abandonment of

[1] Now Section 1623 of Title 18, U.S.C.

the misstatement before justice was prejudiced. *That* Congressional policy has been totally unravelled by the decision below. In consequence this Court's review is essential because Congress never made explicit what is clearly implicit in the history of the provision: that the new section was intended to supplant the old perjury statute, (within the ambit of testimony in federal courts and Grand juries) in order to put into the law Congress' vigorous new anti-perjury policies. Review by this Court is required lest this technical inadvertence reduce the entire Title – and its Congressional purpose – to a dead letter at the whim of any prosecutor. Examination of the entirety of the Title's legislative history and scheme is required to determine if Congress intended an enactment so easily rendered meaningless and as to which each federal prosecutor holds a complete veto. That nullification of Congressional intent is the result arising from the conviction and its affirmance below. Detailed scrutiny of what Congress intended and did not intend is thoroughly justified in face of such a result. This cannot and should not be done in certiorari documents.

(b) In its zeal to argue the merits in this certiorari proceeding, the Government has totally ignored the practical dilemma that it imposes on this Court. For if the Court accepts the abbreviated history of Title IV given it by the Government, it is constructing a trap out of the two Federal perjury statutes. Any potential federal perjurer who is moved to recant promptly by the inducement of Section 1623(d) will be prosecuted under Section 1621. Certainly that was never intended by Congress. Yet that trap is precisely what the law creates, as the Government sees the law. For this reason alone benchmark review of these two statutes is essential.

(c) The Government's brief on the merits is not only abbreviated, it is misleading. Petitioner told the Court that no Court (and certainly not this Court) had dealt with the question of whether Section 1623 supplants Section 1621 in perjury arising in federal court or federal grand jury proceedings. It is clear that this Court has never faced this question but neither *U.S. v. Diggs,* 560 Fed.2nd 266, Cert denied 434 U.S. 925, C.A. 7, 1977, nor *U.S. v. Ruggiero,* 472 Fed.2nd 599, Cert denied 412 U.S. 939, "have ruled on the matter" in the circuit courts, as the Government contends (Gov. Opp. p. 7). In *Diggs,* the Seventh Circuit simply assumed that both 1623 and 1621 applied because the Defendant in *Diggs* never argued that they did not; nor could he, because his sole argument was that the two witness rule of Section 1621 was not complied with in his prosecution, an argument that he could not make while simultaneously arguing that 1623 applied. In *Ruggiero,* the Defendant never argued that 1623 supplanted 1621. Rather, he argued that when the prosecution chose 1623 (rather than 1621) it violated his constitutional rights because of 1623's lighter burden of proof. That constitutional argument is very different from the argument being made by Petitioner.

The closest that any Court has ever come to addressing the issue raised by this Petitioner came in the following succinct statement by the Second Circuit: *U.S. v. Kahn,* 472 F.2d 272; Cert. denied, 411 U.S. 982, C.A. 2, 1973.

> "In response, the Government claims that Section 1623 did not repeal Section 1621, and that the prosecutor has the absolute discretion to choose which section an alleged perjurer will be tried under, and consequently what evidentiary rules will apply to his trial. While it is clear that Section 1623, which applies only to Grand Jury and Court proceedings, did not wholly replace Section 1621, which covers oaths before any "competent tribunal, officer or person," we admit great skepticism about the second half of the government's argument. While perhaps Congress constitutionally could have placed such wide discretion in the prosecutor, we find no clear indication that it means to do so here, and we find not a little disturbing the prospect of the government employment of Section 1621 whenever recantation exists and Section 1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position."

If the Government is right (in its opposition), what disturbed the Second Circuit could become routine practice in the federal Courts. That it not what Congress intended. Certainly it is an important issue which has not been decided by this Court.

III.

The Government has also provided a brief synopsis of the law of recantation under Section 1621. It tells the Court that (assuming 1621 applies in this case) recantation, under federal perjury law goes only to the Defendant's intent at the time of the original false testimony. Again this snapshot of the merits is misleading.

In the forty-two years since *this* Court last gave careful scrutiny to recantation[2] at least two and possibly three separate federal doctrines have developed regarding its impact. The First, from the Ninth Circuit, holds that an immediate recantation causes:

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[2]In *Norris v. U.S.*, 300 U.S. 564, 81 L.Ed. 805, 57 S.Ct. 535 (1937).

"the false statement and its withdrawal . . . to constitute one inseparable incident out of which contention to deceive cannot be drawn", *Llanos-Semarillos v. U.S.*, 177 F.2d, 164, 165 (C.A. 9, 1949).

This federal view of recantation is particularly relevant to the present petition. In it, the fact the immediacy of the recantation (made 40 seconds after the false testimony) is unique in the 140 year history of the crime; no recorded perjury conviction in the history of the crime followed such a recantation.

Another derives from the concept that immediate retraction (and the manifest of interference with the outcome of the judicial proceeding) deprives the episode of legal materiality. *Bechanstin v. U.S.*, 232 F.2d 1 (C.A. 5, 1956).

The third possible version of recantation, which the government contends is the only possible one is that it relates solely to defendant's state of mind at the time of utterance. While there is language in *Norris* to support such interpretation, the case itself does not so decide and none of the cases following *Norris* have so decided.

Thus this Court is faced with a variety of views even if it rejects application of Section 1623, and examines the federal law of recantation under 1621. The facts of the case makes review of these divergent rules a prudent exercise; if the decision below is allowed to stand, the immediacy of the recantation in *Tucker* will be clear precedent for elimination of recantations of any kind, made at any juncture, from federal perjury law, under Section 1621 as well as Section 1623.

IV.

The Government concludes with two additional points:

1. First, it all but concedes that the Sixth Circuit's opinion in this case was in error. There should be no doubt of this:

(a) The rationale used by that Court in affirming the conviction below never surfaced for one moment in the trial court, either before the Court or the jury.

(b) Assuming that the test used by the Sixth Circuit for validity of a recantation, to wit, whether:

"it . . . occurred under a threat that made it manifest that the falsity would be exposed"

is a jury question, petitioner was denied a jury trial on this issue. This denial alone justifies review by this Court.

(c) Assuming that the test used by the Sixth Circuit was the Section 1623 test (since the language used by the Court is Section 1623 language), the Court omitted one of the additional tests for recantation found in the statute; to wit, whether:

"at the time the admission is made, the" (false) declaration has not substantially affected the proceeding."

Since the *Tucker* recantation obviously could not and did not affect the bail proceeding in which it occurred, this omission is glaring.

2. The Government excuses all of the foregoing by stating:

". . . the fact that the court of appeals may have relied on the wrong reasons to reach the correct

> result is not a reason for overturning its judgment." (Gov. Opp. 9)

The "correct result" – according to the Government – is obvious:

> "since petitioner was properly prosecuted under Section 1621, and recantation is not a bar to prosecution pursuant to that section under any circumstance." (Gov. Opp. 11)

If that is the "correct result", it corrects nothing. No one, petitioner or the Government, has ever argued in any court that recantation is a "bar to prosecution" under Section 1621. The issue under Section 1621 that the Sixth Circuit viewed so erroneously was whether the recantation in this case was a *defense*, not whether it was a "bar to prosecution."

Thus, assuming that Section 1621 was properly used, the 40-second recantation in this case should have been reviewed by the Sixth Circuit under any of the recantation tests now used in federal courts. The Sixth Circuit could have applied the *Llanos-Semarillos* test, or the materiality test for this instantaneous recantation. It might have applied the simple intent test. Which test the Court would have chosen – no one will ever know.[3] And then, whether the Sixth Circuit would have validated the recantation in this case under the particular test chosen by the Court – no one will ever know.

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[3]The Government's contention that petitioner's position would "provide a windfall to witnesses whose perjury was quickly exposed (footnote 10, p. 11 Gov. Opp.) is totally misleading. A recantation under those circumstances is no defense under either Section 1621 or 1623; and that hypothesis is light years removed from the factual situation of *Tucker*.

What might result from an examination by the Sixth Circuit of the *Tucker* recantation under any of the recantation tests available under Section 1621 is pure speculation. That speculation can never stand as a "correct result", exculpating manifest error. Pointedly, however, the Government's assertion that recantation can never be a "bar against prosecution" under Section 1621 is an irrelevancy and one with no legal support, beclouding the issue properly before the Sixth Circuit (that of recantation as a *defense* under Section 1621), compounding rather than excusing the manifest error of that court's decision.

V. CONCLUSION

Under any rule of law, recantation within one minute of false testimony, unique in the history of perjury under the federal statutes and at the common law, deserves the attention of this court. When that fact is coupled in the same case with prosecutorial nullification of major Congressional policy enacted in a statute never before reviewed by the Court, justification for review becomes more compelling. When circuit court review of that same

case and that same statute is in plain error, scrutiny by this Court of the complete record below and the entirety of the legislative history of the affected statute manifestly serves the ends of justice.

Respectfully submitted,

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